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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-625

CECIL D. ANDRUS, Secretary of the Interior; and JAMES T. McINTYRE, JR., Director, Office of Management and Budget, *Petitioners,*

v.

SIERRA CLUB, *et al., Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS

Pursuant to Supreme Court Rule 42, written consent to the filing of this brief was sought and obtained from counsel for all parties, and the documents indicating such consent have been filed with the Clerk of the Court.

The Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized and existing for the purpose of engaging in litigation in matters affecting the broad public interest. The

Foundation has over five thousand contributors and supporters throughout the United States. Policy for the Foundation is set by a Board of Trustees composed of concerned citizens.

The Pacific Legal Foundation strongly supports the development of sound policies for implementing the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321, *et seq.*, and has participated as an amicus curiae before this Court in *Kleppe v. Sierra Club*, 427 U.S. 390 (1976), and *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, ___ U.S. ___, 98 S. Ct. 1197 (1978). The Foundation believes that the "rule of reason" propounded by the Court of Appeals embodies an incorrect perception of the appropriate standard of judicial review to be applied to agency decisions regarding NEPA obligations. In addition, the Foundation believes that the injury complained of by respondents is too remote and speculative to support standing.

Pacific Legal Foundation concurs with petitioners that NEPA does not apply to the deliberative process of preparing the budget. However, Pacific Legal Foundation has chosen to address other issues in this brief which may not be fully dealt with by petitioners. Pacific Legal Foundation brings to this case a perspective not presently represented. Petitioners present the important concern that the confidentiality and integrity of the budget process be protected from ill-conceived applications of NEPA. Respondents supply the perspective of citizens in support of increasing the amount of input regarding environmental consequences in the administrative and legislative processes. Pacific Legal Foundation represents a different public interest, which is concerned that the scope of NEPA not be unreasonably expanded and used by the judiciary to invade the decision-making processes of the Executive branch. The public interest would be better served by a construction of the Act which, while ensuring that agencies consider environmental values, refuses to sanction use of NEPA as an impediment to the ongoing deliberative processes of government. Participation by Pacific Legal Foundation in this case will assist in obtaining fuller consideration of the public interest issues.

OPINIONS BELOW

The United States Court of Appeals for the District of Columbia Circuit, in the opinion reported at 581 F.2d 895 (D.C. Cir. 1978), declared that NEPA requires the preparation of an environmental impact statement (EIS) for agency budget proposals to the Office of Management and Budget (OMB) which either change the status quo or usher in a "considered programmatic course following a programmatic review." 581 F.2d at 903. The court also upheld the judgment of the district court that OMB must "initiate the delineation of the procedures required by NEPA in connection with the budget process." 581 F.2d at 905. The opinion of the district court is reported at 395 F. Supp. 1187 (D.D.C. 1975).

INTRODUCTION

This Court's recent decisions in *Kleppe v. Sierra Club, supra,* and *Vermont Yankee, supra,* have interpreted the limits of judicial intervention in reviewing agency compliance with NEPA. This case presents the Court with the question of the proper scope of review to be adopted in NEPA actions, which was acknowledged but not addressed in *Aberdeen and Rockfish Railroad Co. v. Students Challenging Regulatory Agency Procedures (SCRAP II)*, 422 U.S. 289, 326 n.28 (1975).

There continues to be a serious split in the Courts of Appeals regarding the appropriate standard of review to be applied to agency actions under NEPA. The two standards acknowledged in *SCRAP II, id.*, have evolved into three major standards with numerous lesser variations. The Court of Appeals' decision in this case marks the advent of yet a fourth standard. As this Court has recognized,

> the vast majority of challenges to administrative agency action are brought to the Court of Appeals for the District of Columbia Circuit, [and] the decision of that court in this case will serve as precedent for many more proceedings for judicial review of agency actions than would the decision of another Court of Appeals. *Vermont Yankee*, ___ U.S. at ___, 98 S. Ct. at 1208 n.14.

The application by the Courts of Appeals of differing standards of review to the same federal agencies has inhibited coherent development of NEPA law. Confusion reigns as to what is the proper standard. The uncertainty created by these conflicting standards has encouraged courts to fashion additional measures unsupported by either the plain words of NEPA or the provisions of the Administrative Procedure Act (APA), 5 U.S.C. §§ 500, *et seq.*

A decision by this Court delineating the proper role of the judiciary in reviewing agency actions under NEPA will provide a measure of stability and predictability in this area of the law. What is needed is a clear and uniform standard of review of compliance with NEPA. This will enable administrative agencies to make informed judgments on the application of NEPA requirements. This stability of standards of judicial review is necessary to ensure that NEPA will serve its intended purpose of facilitating informed agency decision-making, rather than paralyzing important administrative functions with indecision spawned by court-devised factors applied in flexible and therefore uncertain manners. It will also serve to lessen the constant flood of litigants whose eagerness to force preparation of "adequate" environmental impact statements is exceeded only by their ingenuity in discovering factors which were never "properly" considered.

ARGUMENT

I

THE COURT OF APPEALS HAS APPLIED AN INCORRECT STANDARD OF REVIEW

A. The Courts of Appeals Have Applied Inconsistent Standards of Review to Agency Actions Under NEPA

The federal courts, in enforcing agency compliance with NEPA, have adopted various standards for judicial review of agency decisions on whether or not to file an environmental impact statement (EIS), and for review of the sufficiency of EIS

contents. The principal tests used include the "reasonableness" test, the "without observance of procedure required by law" standard of 5 U.S.C. § 706(2)(D), the "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law" standard of 5 U.S.C. § 706(2)(A), and the "rule of reason". Until the present case, this last rule has served only as a standard of review governing the sufficiency of an EIS.

The standard of review employed most frequently in the circuits is one of "reasonableness". The Eighth Circuit[1] considers this measure to be appropriate for the following reasons:

> An agency decision concerning NEPA requirements is not one committed to the agency's discretion by law within the meaning of the APA, 5 U.S.C. § 701 et seq. The Congressional command that agencies cooperate in attaining the goals of NEPA "to the fullest extent possible" requires the courts to look at the good faith efforts of the agency to comply. To upset an agency determination not to prepare an impact statement, it still must be shown that the agency's determination was not reasonable under the circumstances. This will require a showing that the project could significantly affect the quality of the human environment. We therefore hold that review of an agency's determination not to prepare an impact statement should be measured by its reasonableness in the circumstances, not as to whether it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *Minnesota Public Interest Research Group v. Butz,* 498 F.2d 1314, 1320 (8th Cir. 1974) (footnote omitted; citation omitted).

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[1] Other circuits in which this standard of review, or a variant thereof, has been utilized include the Fifth, in *Save Our Ten Acres v. Kreger,* 472 F.2d 463 (5th Cir. 1973) (employing a "strict reasonableness" test); the Third, in *Township of Ridley v. Blanchette,* 421 F. Supp. 435 (E.D. Pa. 1976); and the First, in *Mont Vernon Preservation Society v. Clements,* 415 F. Supp. 141 (D.N.H. 1976).

The scrutiny of agency action under the "reasonableness" standard is stricter than under the "arbitrary and capricious" standard. This is attributable to the heavy degree of importance placed on NEPA's purpose by the courts. As stated by the Tenth Circuit,

> the proper standard ... is whether the negative determination was reasonable in the light of the mandatory requirements and high standards set by the statute so as to be "in accordance with law"—another ground of review in § 706(2)(A) which may be applied consistently with the procedural demands of NEPA. *Wyoming Outdoor Coordinating Council v. Butz,* 484 F.2d 1244, 1249 (10th Cir. 1973) (footnote omitted).

The Ninth Circuit employs the "without observance of procedure required by law" standard, and has justified its use by maintaining that

> NEPA is essentially a procedural statute. Its purpose is to assure that, by following the procedures that it prescribes, agencies will be fully aware of the impact of their decisions when they make them .... That result can be achieved only if the prescribed procedures are faithfully followed; grudging, *pro forma* compliance will not do. We think that the courts will better perform their necessarily limited role in enforcing NEPA if they apply § 706(2)(D) in reviewing environmental impact statements for compliance with NEPA than if they confine themselves within the straight jacket [*sic*] of § 706(2)(A). *Lathan v. Brinegar,* 506 F.2d 677, 693 (9th Cir. 1974).

Yet that court has admitted in a subsequent case that "[t]he standard presently is more *ad hoc* in character than might be thought proper." *Cady v. Morton,* 527 F.2d 786, 793 (9th Cir. 1975). Indeed, the standard allows reviewing courts so much latitude that the Ninth Circuit has remarked that the problem with it

> lies in the fact that the "procedure required by law" by which sufficiency of the EIS is measured consists substantially of judicial responses to specific allegations of insufficiency directed at specific impact statements prepared in connection with particular projects that were challenged in various federal courts. Neither NEPA nor the "Guidelines" of the Council on Environmental Quality set forth sufficiently comprehensive "procedures" to obviate the necessity to resort to such judicial responses. The consequence has been and, to a degree, is that the judicial review of the adequacy of an EIS employs standards fashioned to meet the needs of the particular case in which the standards are applied. In due course the presence of a large volume of case law and the principle of *stare decisis* will yield reasonably precise "procedural rules" by which the adequacy of an EIS can be measured. That time, however, has not arrived. *Trout Unlimited v. Morton,* 509 F.2d 1276, 1282-83 (9th Cir. 1974).

Use of this standard allows a much greater degree of judicial intervention in the administrative process, and invites the court to substitute its judgment for that of the agency, under the guise of passing upon the sufficiency of an EIS. It allows the court to review questions of fact, a determination of which is, and properly should be, left with the agencies.

The other main standard of review is under the "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" test. This Court, in a non-NEPA case, held that a determination under this test requires a court to

> consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. [Citations omitted.] Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a

narrow one. The court is not empowered to substitute its judgment for that of the agency. *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 416 (1971).

This standard has explicitly been held applicable to challenges to agency action arising under NEPA. The Second Circuit[2] has indicated that it sees

> no reason for application of a different approach here since the APA standard permits effective judicial scrutiny of agency action and concommitantly [sic] permits the agencies to have some leeway in applying the law to factual contexts in which they possess expertise. Accordingly we conclude that the applicable scope of review of an agency's threshold determination that an impact statement is not required under § 102 of NEPA is the "arbitrary, capricious, abuse of discretion" standard. *Hanly v. Kleindienst,* 471 F.2d 823, 829-30 (2d Cir. 1972).

Necessarily, the scope of review under this standard is much more limited, and does not sanction as much judicial inquiry into the justification for an agency's conclusions.

Although this standard of review has been endorsed within the District of Columbia Circuit[3], neither the district court nor the circuit court followed it in the instant case. Instead, as will be more fully explained *infra,* the Court of Appeals employed the "rule of reason" as the standard of review, and proceeded to set out in advance the factual criteria to be used by an agency

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[2] Other circuit courts in which the "arbitrary and capricious" standard has been applied to NEPA cases include the Seventh, in *Nucleus of Chicago Homeowners Ass'n v. Lynn,* 524 F.2d 225, 229 (7th Cir. 1975), *cert. denied,* 424 U.S. 967 (1976); and the Fourth, in *Coalition for Responsible Regional Development v. Coleman,* 555 F.2d 398 (4th Cir. 1977).

[3] *Concerned About Trident v. Schlesinger,* 400 F. Supp. 454, 487 (D.D.C. 1975), *remanded on other grounds,* 555 F.2d 817 (D.C. Cir. 1977).

in determining whether an EIS is required. Such variation from the scope of review set out in the APA is improper. *Cf. Kleppe v. Sierra Club, supra,* and *Vermont Yankee, supra.*

In *Vermont Yankee,* a case involving the interface of NEPA and the APA in agency rulemaking, this Court

> emphasized that the only procedural requirements imposed by NEPA are those stated in the plain language of the Act. [Citation omitted.] Thus, it is clear NEPA cannot serve as the basis for a substantial revision of the carefully constructed procedural specifications of the APA. *Vermont Yankee,* ____ U.S. at____, 98 S. Ct. at 1214.

The administrative decision in this case involves neither rulemaking nor adjudication, and review should be had under the provisions of Section 706(2)(A), as was done in *Citizens to Preserve Overton Park, Inc., supra.* This standard appears to have been sanctioned by this Court in *Kleppe v. Sierra Club,* 427 U.S. at 412, where it stated in regard to the refusal to file a regional EIS that "absent a showing of arbitrary action, we must assume that the agencies have exercised this discretion appropriately."

B. The Court of Appeals' Application of the "Rule of Reason" as a Standard of Review Is Unwarranted

As indicated *supra,* the Court of Appeals did not clearly set forth the standard of review it applied to the agency's determination that no EIS was necessary in connection with the budget proposal in this case. Indeed, the Court of Appeals in its decision on the status of agency budget proposals to OMB under NEPA has formulated yet another "balancing test" of the sort which was struck down in *Kleppe v. Sierra Club, supra.* In that case, this Court emphatically rejected the substitution of "court-devised" factors for the clear instruction of the APA.

In determining that only certain types of budget proposals are to be considered "proposals" within the meaning of NEPA,

the Court of Appeals relied upon several cases which had applied a "rule of reason" in challenges to the *adequacy* of an EIS. In doing so, the court failed to distinguish the process of statutorily interpreting NEPA from the process of reviewing an agency's implementation thereof.

The particular "rule of reason" as applied to review of the sufficiency of an EIS has found substantial support in the various circuit courts. It is a test designed to confine EIS contents to the realm of the "reasonable", thus insulating them to some degree from attack based on alleged agency failure to consider the most remote of possibilities. This rule thus prevents the misuse of NEPA "as a crutch for chronic fault-finding." *Life of the Land v. Brinegar,* 485 F.2d 460, 472 (9th Cir. 1973).

> This standard has been described as requiring courts to
>
> "recognize 'on the one hand that the Act mandates that no agency limit its environmental activity by the use of an artificial framework and on the other that the act does not intend to impose an impossible standard on the agency.' The court's task is to determine whether the EIS was compiled with objective good faith and whether the resulting statement would permit a decisionmaker to fully consider and balance the environmental factors . . . (footnotes omitted)." *Sierra Club v. Froehlke,* 534 F.2d 1289, 1300 (8th Cir. 1976) *quoting from Sierra Club v. Morton,* 510 F.2d 813, 818-19 (5th Cir. 1975).

To this end, "a reasonably thorough discussion of the significant aspects of the probable environmental consequences is all that is required by an EIS." *Trout Unlimited v. Morton,* 509 F.2d at 1283.

The most recent endorsement of this "rule of reason" within the District of Columbia Circuit was in *Natural Resources Defense Council, Inc. v. Administrator, Energy Research and Development Administration,* 451 F. Supp. 1245 (D.D.C.

1978). The court's comments on the soundness of the rule included the following:

> While the *Vermont Yankee* decision reversed the Court of Appeals' particular *application* of NEPA's "rule of reason" in *Aeschliman v. United States Nuclear Regulatory Commission,* 178 U.S.App.D.C. 325, 547 F.2d 622 (1976), the Supreme Court's decision in no way undermines, and in fact affirms, the appropriateness of the "rule of reason" as the basis for assessing agency compliance with Section 102(2)(C) of NEPA. *Id.* at 1261 (footnote omitted; emphasis in original).

In the instant case, the Court of Appeals is expanding the concept of the rule of reason from a criterion to be employed in determining whether the content of an EIS is sufficient to a standard of review to be applied in determining the *meaning of the statute.* By expanding its applicability to include decisions of what *types* of proposals must be accompanied by an EIS, the Court of Appeals has formulated a new standard of review which does not comport with the "arbitrary and capricious" standard of the APA. The court's justification for the adoption of such a rule clearly indicates this result. As stated by the court:

> There is a danger of overburdening NEPA by spreading its mandate too widely. The environmental analysis required by NEPA is governed by the rule of reason, as we have held *in determining the scope of realistic alternatives to the proposed action and the intensity of the required analysis.* A rule requiring preparation of an EIS on the annual budget request for virtually every ongoing program would trivialize NEPA. In our view, section 102(2)(C) contemplates a "proposal" for taking new action which significantly changes the status quo, not for a routine request for budget approval and appropriations for continuance and management of an ongoing program.

> We hasten to add the qualification that NEPA may have application to those budget requests that follow or accompany an agency's painstaking review of an ongoing program. *The need is for a reading of NEPA that harmonizes its words, its purposes, and the rule of reason.* Hence, a "proposal for legislation," within § 102(2)(C), is not applicable when the budget and appropriation process is routine, but is fully applicable when the request for budget approval and appropriations is one that ushers in a considered programmatic course following a programmatic review. A review of such a nature reflects *choices* that should under NEPA be made in the light of a full consideration of pertinent environmental consequences and alternatives. *Sierra Club v. Andrus,* 581 F.2d 895, 903 (D.C. Cir. 1978) (footnotes omitted; emphasis added).

Although the court is properly concerned with "overburdening NEPA", it is not the province of the judiciary to usurp the role of Congress by developing criteria to determine the scope of the burdens imposed by statute. *Cf. Tennessee Valley Authority v. Hill,* ___ U.S. ___, 98 S. Ct. 2279 (1978). The court, in attempting to limit NEPA "burdens", devised its own standards for determining which types of budget proposals are "proposals" within the meaning of the statute. In so doing, the court has devised a test which sanctions judicial involvement and intrusion into the ongoing budget-making process to determine whether the "proposal" in question will change the status quo (a factual determination) or whether a "new look" (a factual determination) is being had at the agency's overall program.[4] As Judge MacKinnon noted in his dissent,

> the opinion has attempted to rely on a flexible "rule of reason" approach, rather than heeding the straightforward words of NEPA.... *Sierra Club v. Andrus,* 581 F.2d at 906.

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[4] *Sierra Club v. Andrus,* 581 F.2d 895, 903-04 (D.C. Cir. 1978).

This "flexible approach" is analogous to the "balancing test" which was disapproved in *Kleppe v. Sierra Club,* 427 U.S. at 404-06, and the same rationale given there militates against sanctioning such a rule in this case:

> The procedural duty imposed upon agencies by this section is quite precise, and the role of the courts in enforcing that duty is similarly precise. A court has no authority to depart from the statutory language and, by a balancing of court-devised factors, determine a point during the germination process of a potential proposal at which an impact statement *should be prepared.* Such an assertion of judicial authority would leave the agencies uncertain as to their procedural duties under NEPA, would invite judicial involvement in the day-to-day decisionmaking process of the agencies, and would invite litigation. As the contemplation of a project and the accompanying study thereof do not necessarily result in a proposal for major federal action, it may be assumed that the balancing process devised by the Court of Appeals also would result in the preparation of a good many unnecessary impact statements. *Id.* at 406 (emphasis in original).

In conclusion, the rule adopted by the court is sure to result in agency uncertainty as to when NEPA responsibilities are triggered. A rule as vague in its applicability as the one the Court of Appeals has adopted is particularly inappropriate for review of agency programs which require great flexibility, such as the budget-making process involved here. For this reason, the Court of Appeals' rule should be overturned, since the scope of review it applies is greater than that contemplated by 5 U.S.C. § 706(2)(A) of the APA.

II

RESPONDENTS LACK STANDING TO CONTEST OMB'S FAILURE TO FULFILL ITS ALLEGED NEPA OBLIGATIONS IN CONNECTION WITH THE BUDGET PROCESS

It has been well established that standing to sue is an essential element of a cause of action and must be demonstrated as well as alleged. *Sierra Club v. Morton,* 405 U.S. 727 (1972). Under the standing requirements established by *Data Processing Service v. Camp,* 397 U.S. 150 (1970), and *Barlow v. Collins,* 397 U.S. 159 (1970), a plaintiff must allege 1) that the challenged agency action has caused him "injury in fact", and 2) that the injury was to an interest arguably within the "zone of interests" to be protected by NEPA. Since "NEPA was formulated to protect conservational, environmental, and aesthetic interests", *Cummington Preservation Committee v. FAA,* 8 ERC 1121, 1123 (D. Mass. 1975), there seems to be little possible dispute over the "zone of interests" requirement.

However, the fact "[t]hat plaintiff's interests are cognizable generally under NEPA ... does not compel the determination that it has sustained an injury in fact sufficient to maintain this action." *Chamber of Commerce of the United States v. Department of Interior,* 439 F. Supp. 762, 766 (D.D.C. 1977). It is extremely difficult to perceive how OMB's failure to develop NEPA procedures for use during the budget process has caused any harm at all to respondents.

> [T]he issue at this point devolves on the nature of the injury in fact required under NEPA: May the injury derive solely from the submission of legislative proposals without an adequate EIS, and the concomitant denial of participation in the process of compiling an EIS, or must it comprise a more immediate, less speculative threat to the interests of the plaintiff? *Id.*

Three recent cases decided in the District and Circuit Courts for the District of Columbia have dealt with the concreteness of the injury necessary to sustain standing for plaintiffs who are alleging harm from the ongoing legislative process. All three decisions[5] have found the injury to be too speculative and the possibility of redress too indirect to provide standing. *See, e.g., Simon v. Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26 (1976).

Foremost among these cases is *Harrington v. Bush,* 553 F.2d 190 (D.C. Cir. 1977), in which the plaintiff, a member of the House of Representatives, sought both a declaratory judgment that certain activities of the Central Intelligence Agency (CIA) were illegal and an injunction prohibiting the CIA from using its appropriations in furtherance of the allegedly illegal activities. The Court of Appeals held that the plaintiff lacked standing. It stated that in cases involving challenges to an Executive function, there is a

> need for a *very clear* showing of concrete, personal injury ... so that federal courts will not be thrust into the role of "continuing monitors of wisdom and soundness of Executive action...." (Emphasis in original). *Harrington v. Bush, id.* at 215, *quoting from Laird v. Tatum,* 408 U.S. 1, 15 (1972).

The other two cases have dealt with the precise issue involved in this case: whether the submission of a legislative proposal without an adequate EIS,[6] or any EIS at all,[7] was an injury to plaintiffs' interests sufficient enough to provide the necessary element of concreteness to support standing.

In the first case, the court held that transmittal by the Secretary of the Interior to Congress of a recommendation

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[5] *Harrington v. Bush,* 553 F.2d 190 (D.C. Cir. 1977); *Chamber of Commerce of the United States v. Department of Interior,* 439 F. Supp. 762 (D.D.C. 1977); *Wingfield v. OMB,* 9 ERC 1961 (D.D.C. 1977).

[6] *Chamber of Commerce of the United States v. Department of Interior,* 439 F. Supp. 762, 764 (D.D.C. 1977).

[7] *Wingfield v. OMB,* 9 ERC 1961 (D.D.C. 1977).

accompanied by an insufficient EIS did not constitute an injury in fact to the plaintiff's interests. The effect of the proposals

> on the contents of any subsequent legislation and the date of the ultimate enactment of such legislation [is] speculative to say the least. *Chamber of Commerce of the United States v. Department of Interior,* 439 F. Supp. at 766.

In *Wingfield v. OMB,* 9 ERC 1961 (D.D.C. 1977), an individual sought to compel several government agencies to include EISs in their reports and recommendations to Congress concerning strip-mining proposals. The court held

> that the injury here is too speculative and remote to support standing. The injury here would occur only if the House accepts CEQ's recommendations, the Senate accepts them as well and that the legislative package as finally passed by both Houses is signed into law by the President. *Id.* at 1963.

An even greater degree of speculative injury is present in the case before this Court, since the proposals in question are subject to substantial revision by OMB, the President, and both Houses of Congress before they are finally signed into law. In light of the uncertain nature and degree of injury, and the possibly crippling effects of similar lawsuits on the ability of agencies to fulfill their duties, this Court should hold that respondents lack standing.

CONCLUSION

The Court of Appeals' use of the "rule of reason" as a standard of review in statutory interpretation of NEPA is incorrect. By attempting to engraft a rule previously used only in testing the adequacy of an EIS onto the law governing reviewability of an agency's threshold determination of whether or not to prepare an EIS, the court has succeeded only in compounding the confusion which already prevails in this area of the law. In agency programs which demand flexibility, such as the budget-making process, there is no justification for a standard of review which allows courts to effectively hamstring agency actions. What is needed is a consistently applied standard which minimizes judicial interference and disruption of agency programs, and allows agencies the needed degree of flexibility to carry out their statutory mandates. There can be no certainty as to what is required of agencies in fulfilling NEPA obligations as long as the standards of review applied by the various courts differ so widely.

For the reasons stated above, Pacific Legal Foundation urges the Court to reverse the decision of the Court of Appeals, and establish a uniform national standard of review under the "arbitrary and capricious" standard of 5 U.S.C. § 706(2)(A). Such a standard will best serve the public interest by promoting

the congressional policy expressed in NEPA and by alleviating the confusing and conflicting requirements imposed on administrative agencies under the current state of the law.

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